IN THE MATTER OF AH YEE CONTRACTORS PTE. LTD.

HIGH COURT, SINGAPORE
LP THEAN J
[COMPANIES WINDING-UP NO. 740 OF 1986]
3 JULY 1987

COMPANY LAW: *Winding-up - Whether petitioner has tangible interest in relief sought - Question of locus standi - Whether petitioner may have recourse to winding-up proceedings to compel company to discharge debt - Substratum of the company - Whether just and equitable that company should be wound up.*

The petitioner, in this case, had brought a petition for the winding up of Ah Yee Contractors (Private) Limited as a contributory on just and equitable grounds. The petition was opposed by the company and another contributory, Madam Goh, a majority shareholder of the company.

The company was incorporated on 16 June 1969 at the instance of one Boey, with the petitioner being one of the subscribers. One of the objects of the company was to carry on the business of building contractors. At the time of incorporation Boey was the sole proprietor of a business of general building and renovation contractor. The petitioner was first employed by Boey. The company did not carry on any business until 1975. On 1 January 1975, Madam Goh the second wife of Boey was appointed a director of the company and Boey was the chairman and managing director. In March 1975 Boey mortgaged his residence to Chung Khiaw Bank Limited to secure the company's overdraft account with the bank up to the limit of $150,000. On 13 September 1976 6,000 shares were issued and allotted apart from others to Boey's son by his first wife and 16,000 shares to Madam Goh.

Boey died in 1983 and subsequently, Madam Goh assumed the chairmanship of the company. In 1984 Boey's son by his first wife transferred his 6,000 shares to Madam Goh. The business of the company declined and fresh loans were raised. In August 1984, the company had difficulty in repaying the cash loans and interest thereon. The petitioner then used his personal assets to raise funds to discharge the company's liabilities.

There were two areas of dispute. First the various amount advanced by the petitioner to the account of the company was questioned besides the amount of interest charged by the petitioner. Secondly, the petitioner had objected to payments to the company being paid to Chung Khiaw Bank Limited, on the grounds that such payment would in effect discharge the security provided for by the Estate of Boey, deceased. On this basis the petitioner contended that there was a deadlock between him and Madam Goh in the management of the company and that it was just and equitable that the company should be wound up.

The main questions before the Court were:

1. Whether the petitioner has a tangible interest in the winding up; and
2. Whether it is right to wind up the company to compel it to discharge or acknowledge the debt owing to the petitioner?

Held:

[1] Although the petitioner has a tangible interest in the winding up of the company, (being a creditor) and has the *locus standi* to present the petition, it is wrong for him to have recourse to winding up proceedings to compel the company to discharge or acknowledge the debt owing to him.

[2] The petitioner was at liberty to institute a suit against the company for the recovery of the amount owed to him plus interest. Equally, the company was at liberty to dispute such items of the debt owing the petitioner as it deems fit as the company may well have genuine grounds to dispute a substantial portion of the amount owing.

[3] The contention that the substratum of the company has gone was unsustainable. As there is not the slightest shred of evidence to support this contention, therefore this ground must fail.

[4] The petitioner has not made out his case that it is just and equitable that the company should be wound up. Accordingly the petition was dismissed with costs.

[Petition dismissed with costs.]

Cases referred to:
Re Othery Construction Ltd. [1966] 1 All ER 145
Re Expanded Plugs Ltd. [1966] 1 WLR 514
In re Rica Gold Washing Company [1879] 11 Ch D 36
In re Westbourne Galleries [1973] AC 360

For the petitioner - Wee Han Kim
For the company & the majority shareholder - Stanley Wong Hoong Hooi

JUDGMENT

LP Thean J:

This is a petition by Lieu Poh Toon, as a contributory, for the winding up of Ah Yee Contractors (Private) Limited ("the company") on the ground that it is just and equitable that the company should be wound up. The petition is opposed by the company and another contributory, Goh Ah Aun ("Madam Goh"), who holds more than 50% of the issued shares of the company.

The material facts leading to the presentation of the petition are these. The company was incorporated on 16 June 1969 with an authorised capital of $200,000 divided into 200,000 shares of $1 each. The company was incorporated at the instance of one Boey Chun Heng ("Boey"), and the subscribers to the Memorandum and Articles of Association of the company were Boey and the petitioner, both of whom were also named in the Articles as the first directors. The issued capital of the company at that time was only $2 comprising the two subscribers' shares of $1 each held by Boey and the petitioner respectively The objects for which the company was incorporated are general and one of its objects is to carry on the business of building contractors.

At the time of the incorporation of the company, Boey was the sole proprietor of a business of general building and renovation contractor under the name and style of Ah Yee Contractors. That business was started by Boey's stepfather some time before the Second World War and after his step-father's death, Boey took over and continued the business. The petitioner was first employed by Boey in or about 1955 as a clerk-of-works, and, over the next five to six years, had become almost Boey's general manager of the business; Boey practically left the day to day running of the business to the petitioner as Boey was involved in other businesses or activities.

Though the company was incorporated in 1969, it did not commence carrying on any business until 1975, when it took over the business of Boey then carried on under his sole proprietorship. On 1 January 1975, Madam Goh (who is the second wife of Boey) was

appointed a director of the company and Boey was the chairman and managing director. In March 1975, Boey mortgaged his residence, No. 190, Lornie Road, Singapore to Chung Khiaw Bank Limited to secure the company's overdraft account with the bank up to the limit of $150,000. On 13 September 1976, the company issued and allotted shares for cash at par as follows:

(a) 7,999 shares to Boey,

(b) 9,999 shares to the petitioner,

(c) 6,000 shares to Boey Fook Kee (Boey's son by his first wife), and

(d) 16,000 shares to Madam Goh,

making a total of 39,998 shares, which together with the 2 subscribers' shares amounted to 40,000 shares. It is obvious that the company, which was formed by or at the instance of Boey and which took over his business, was intended by him to be his own company in which he and members of his family together would hold the majority shares with a minority stake allotted to the petitioner, who by then had been working for Boey for nearly 20 years. The petitioner must have been regarded by Boey as a trusted and loyal employee, and permitting the petitioner to take an interest in the company would ensure his continued service in the company.

Unfortunately, Boey died in August 1983. After Boey's death, Madam Goh assumed the position of chairman of the company and the petitioner continued to take care of the day to day management. In 1984, Boey Fook Kee transferred his 6,000 shares to Madam Goh and thenceforth the issued shares of the company were and are held as follows:

(1) Estate of Boey Chung Heng deceased ... 8,000 shares

(2) The petitioner ... 10,000 shares

(3) Madam Goh ... 22,000 shares

The business of the company declined owing to general recessionary conditions. The company raised fresh loans totalings about $55,000. In August 1984, the company had difficulty in repaying the cash loans and the interest thereon. It was alleged by the petitioner, but disputed by Madam Goh, that at that juncture, Madam Goh requested the petitioner to raise more capital so as to solve the financial problem of the company. According to the petitioner, he then used his personal assets to raise funds to discharge the company's liabilities. In particular, he claimed that on 2 April 1985 he mortgaged his residence No. 6, Greenleaf Avenue, Singapore to Malayan Banking Berhad to secure his own personal current account up to the limit of $250,000, and between 11 April 1985 and 10 July 1986, he drew various sums from his own account to pay for moneys owing to subcontractors and wages to workers and other members of the staff of the company. The petitioner claimed that a total sum of $176,882.59 had been drawn from his personal banking account to meet the company's liabilities, and from to time, various amounts in part-payment were repaid by the company to his personal account. As at the date of the filing of the petition, he claimed that the amount owing to him by the company together with interest amounted to $151,034.65.

While Boey was alive, cheques drawn on the company's banking accounts were signed by Boey and the petitioner, with Madam Goh as the alternate signatory of Boey. After Boey's death, Madam Goh and the petitioner were the joint signatories. On 21 March 1986, a Board resolution was passed whereby Lim Chin Seng (a son of Madam Goh by her first marriage) was authorised to sign as the alternate signatory to Madam Goh, but all cheques continued

to be countersigned by the petitioner. On 9 July 1986, an attempt was made by Madam Goh to appoint Lim Chin Seng as an additional director and to authorise cheques drawn on the company's account to be signed by Madam Goh and Lim Chin Seng without the necessity of the petitioner countersigning the same. This proposed resolution was opposed to by the petitioner and was not passed.

The company made a loss of $54,007.39 in 1984 and a loss of $64,747 in 1985. Differences between Madam Goh and the petitioner soon emerged. Principally there are two areas of disputes between them. First, Madam Goh questioned various amounts said to be advanced by the petitioner to or for the account of the company and also the amount of the interest charged by the petitioner. Such dispute relates more to the extent of advances made to the company; Madam Goh does not appear to dispute all the advances. Secondly, in 1986, it appears that payments made by a customer of the company had been paid into their company's overdraft account with Chung Khiaw Bank Limited which is secured by the property, 190, Lornie Road, Singapore, which belongs to the Estate of Boey Chun Heng deceased. This was objected to by the petitioner, who maintained that such payments would in effect discharge the security provided for by the Estate. On the basis of these differences the petitioner contends that there is a complete deadlock between him and Madam Goh in the management of the company and that it is just and equitable that the company should be wound up.

The petition, on the face of it, does not contain much information on the financial position of the company as at the date of its presentation. In particular, it gives no information whether its assets exceed its liabilities so that upon winding up of the company there would be a surplus available for distribution to the shareholders after discharge of all its debts and liabilities. Both the petition and the affidavit of the petitioner affirmed on 4 November 1986 exhibited a draft balance sheet as at 31 December 1985 and a profit and loss account for the year ended 31 December 1985. The balance sheet shows a net deficit of $121,279, and the profit and loss account shows an accumulated loss of $161,279. The balance sheet also shows an item of fixed assets amounting $42,554, and I was told by both Counsel that the fixed assets consist of only movable property. Since 31 December 1985, it does not appear - either from the petition or from the affidavit of the petitioner - that the company's financial position has improved or deteriorated. Regrettably there is a paucity of evidence on this point. However, as a matter of inference, it seems to me that there is a probability that upon a winding up of the company there would be no surplus available for distribution to the shareholders after all the debts and liabilities of the company have been discharged. In view of this, a question immediately arises: whether the petitioner, as a fully paid shareholder, has any real interest in the relief sought on this petition. Two recent cases bearing on this point are *Re Othery Construction Ltd.* [1966] 1 All ER 145 and *Re Expanded Plugs Ltd.* [1966] 1 WLR 514, to which I drew Counsel's attention. In *Re Othery Construction Limited*, the petition was presented by a fully paid shareholder who alleged that the company was insolvent and that it was just and equitable that the company should be wound up. At the hearing of the petition, a preliminary objection was taken by the opposing contributory that the petition alleged insolvency; that there was no prospect of there being anything available in a winding up for the shareholders, and that, accordingly, the petitioner had no *locus standi* to petition for the winding up of the company. This was upheld by Buckley J He said, at p. 47:

> It has long been accepted and recognised down to the present time that the rule that a contributory petitioner must show that there is a probability of a surplus is still the rule; indeed that was recognised by Pennyquick J, in a case which Counsel for the petitioner himself

cited: *Re Newman and Howard Ltd.* [1961] 2 All ER 495, where the learned Judge said: "There is no doubt that the general rule is as stated by the Court of Appeal in *Re Rica Gold Washing Co.* ... [1879] 11 Ch D 36" and the same view was expressed by Wynn-Parry J, a Judge of great experience in this branch of the law, in *Re S.A Hawken Ltd.* [1950] 2 All ER 408. In my judgment it still remains a rule of this Court that where a fully paid shareholder petitions for compulsory winding-up he must show, on the face of his petition, a *prima facie* probability that there will be assets available for distribution amongst the shareholders.

In the case of *Re Expanded Plugs Ltd.*, the petition was presented by a contributory, who was a fully paid shareholder, and was based on the ground that it was just and equitable that the company should be wound up. It appeared from the evidence that the company was insolvent, and Plowmen J held, *inter alia*, that in that event, if the company was wound up there would be no surplus for the contributories. In those circumstances, he held that the petitioner was not entitled to present the petition. The basis for this rule was very clearly stated in the judgment of Jessel MR in the case of *In re Rica Gold Washing Company* [1879] 1 Ch D 36, which was quoted and relied upon in both the cases. Jessel MR said, at pp. 42 to 43:

Now I will say a word or two on the law as regards the position of a petitioner holding fully paid-up shares. He is not liable to contribute anything towards the assets of the company, and if he has any interest at all, it must be that after full payment of all the debts and liabilities of the company there will remain a surplus divisible among the shareholders of sufficient value to authorise him to present a petition. That being his position, and the rule being that the petitioner must succeed upon allegations which are proved, of course the petitioner must show the Court by sufficient allegation that he has a sufficient interest to entitle him to ask for the winding-up of the company. I say "a sufficient interest", for the mere allegation of a surplus of a probable surplus will not be sufficient. He must show what I may call a tangible interest. I am not going to lay down any rule as to what that must be, but if he shewed only that there was such a surplus as, on being fairly divided, irrespective of the costs of the winding up, would give him £5, I should say that would not be sufficient to induce the Court to interfere in his behalf.

From these authorities it seems to me that a petitioner for the winding up of a company, in which he is a fully paid shareholder, must show that he has a tangible interest in relief sought, i.e., the winding up, and where it is not shown that upon the winding up, after full payment of all debts and liabilities of the company, there is a surplus divisible among the shareholders, then he has no interest "sufficient to induce the Court to interfere in his behalf". The whole question therefore turns on whether the petitioner in this case has a tangible interest upon the winding up of the company. Turning to the facts, so far as they can be gleaned from the affidavits filed, it is by no means clear that the company is insolvent. Both Counsel take the stand that the company is insolvent. But the evidence in support is lacking. Mr. Wee for the petitioner referred me to the draft balance sheet and profit and loss account of the company for the year ended 1985. There are three difficulties in the way in accepting such financial statements. First, these were mere drafts and had not been accepted by the company, or, for that matter, by the board of directors including no less the petitioner. Secondly, as regards the amount of $162,294 said to be owing to the petitioner, various sums comprised in this amount have been challenged by Madam Goh, and if her challenge is successful, the company's finances might well be in credit. Thirdly, they are out of date, and there is really no evidence that the financial position of the company has deteriorated. Be that as it may, it seems to me that the petitioner has an interest, in the words of Jessel MR, sufficient to induce the Court to interfere in his behalf. Apart from being a fully paid shareholder the petitioner is a creditor of the company. From what I can gather from the petition and the

affidavits filed, it is not really disputed that the company is indebted to the petitioner; what is hotly in dispute is the extent of its indebtedness to the petitioner and the liability of the company to pay interest on the amount advanced by the petitioner to the company. In other words, the question is not whether any money is owing by the company to the petitioner but how much really is owing. The petitioner therefore has an interest - a tangible interest - on the winding up of this company; he is a creditor of the company and therefore has *locus standi* to present this petition.

I now turn to consider the petition on its merit. As described above, basically, the petitioner has two complaints. First, the petitioner said that Madam Goh, as the chairman of the company, had refused to accept or recognised various sums owing to him, which together with interest, he said, amounted to $151,034.65 as at the date of the petition. Secondly, the petition alleged that various amounts owed by a customer of the company had been paid to the overdraft account of the company with Chung Khiaw Bank Limited, which account is secured by the property belonging to the estate of Boey Chun Heng deceased. In so far as the first complaint is concerned, the petitioner is at liberty to institute a suit against the company for recovery of the amount owing to him plus interest. In my view, it is wrong for him to have recourse to winding up proceedings to compel the company to discharge or acknowledge the debt owing to him. Equally, the Company is at liberty to dispute such items of the debt owing to the petitioner as it deems fit; the company may well have genuine grounds to dispute a substantial portion of the amount owing. It is not possible at this stage or at least on the material before me to say that the company's defence to the claim by the petitioner is groundless. As for the second complaint, the company is indebted to Chung Khiaw Bank Limited on the overdraft account and in the circumstances of this case I do not see why the company is not entitled to use its funds to pay up such an overdraft account; admittedly such payment would go towards discharging *pro tanto* the security provided for the overdraft account, i.e., the mortgage of No. 190, Lornie Road, Singapore which belongs to the estate of Boey Chun Heng deceased.

In my view, these difference do not really amount to a deadlock in the management of the company. If the petitioner is minded to do so, he can still continue to conduct the day to day management of the business of the company. There is no suggestion that he was prevented in any way from so doing. Assuming that there is a deadlock, it can be resolved in two ways: first, under Article 92 of the Articles of Association of the company, Madam Goh as the chairman has a second or casting vote in the event of an equality of votes at a directors' meeting; secondly, the shareholders at a general meeting may appoint an additional director. If the petitioner and Madam Goh cannot agree on matters relating to the management of the company, there is no reason why Madam Goh should not exercise her voting right at a shareholders' meeting to appoint an additional director or directors of the company. In fact, at one stage the petitioner appeared to be willing to accept the appointment of a new director and resign from his directorship of the company.

Though the petition was founded on the subsistence of a deadlock between the petitioner and Madam Goh in the management of the company, Mr. Wee raise two other grounds. First, he said there was bad faith or a lack of probity on the part of Madam Goh in (i) refusing to acknowledge various amounts owing by the company to the petitioner and (ii) in applying funds received from a customer towards payment of the overdraft account with Chung Khiaw Bank Limited, and therefore it is just and equitable to wind up the company. In support, he relied on the case of *In re Westbourne Galleries* [1973] AC 360. I do not see how that case can really be of any assistance to me. There, two partners, E. and N., had been in business

for quite some time, and, subsequently, formed a private limited company, in which each held in the same number of shares, to take over their business. Soon after the formation, N. introduced his son to the company and some shares were transferred by both of them to the son, with the result that N. and his son together had a majority shareholding in the company. Subsequently, differences arose between N. and his son on the one hand and E. on the other, and N. and his son took steps to remove E. from the office of a director. E. thereupon presented a petition for the winding up of the company on the ground that it was just and equitable that the company should be wound up. Plowman J who heard the petition, allowed the petition and made a winding up order, but on appeal, his decision was reversed. On further appeal, the House of Lords reversed the decision of the Court of Appeal and restored the order made by Plowman J. It was held that in that case, E. and N. had formed the company on the basis that their prior association in which E. was entitled to participate in the management would, as a matter of personal relationship and good faith, remain the same and that to exclude E. from participation in the partnership.

In this case, the position is clearly different. It seems to me clear that at the time when the company was incorporated, Boey intended it to be a company to take over and continue his business which he had been carrying on as a sole proprietor for many years. It was formed essentially so that he and his family could have shares in it, and since the petitioner had been working for him for a considerable period of time, he was allowed to have a minority stake in the company. It was never meant to be a partnership between Boey and his wife on the one had the petitioner on the other. At any rate, there was no attempt made by Madam Goh to exclude the petitioner from participation in the management of the company or oust him from the board. Nor, on the material before me, was there sufficient evidence to show any breach of good faith or a lack of probity on the part of Madam Goh.

The second ground on which Mr. Wee relies is that the substratum of the company has gone and therefore it is just and equitable that the company should be wound up. He said that the petitioner had withdrawn from the company since the end of 1986 and since then the company has had no contracting business and is an empty shell. On this, he is met with an insurmountable difficulty: there is not the slightest shred of evidence to support his contention. In my view this ground is clearly unsustainable and must fail.

In conclusion, I find that the petitioner has not made out his case that it is just and equitable that the company should be wound up, and accordingly, I dismiss the petition with costs. The injunctions previously granted pending the hearing of this petition, should now be discharged.

Also found at [1988] 1 CLJ 417